TABLE OF CONTENTS

	PAGE
I. Citations to Opinion Below	1
II. Jurisdiction	2
III. Questions Presented for Review	2
IV. Statement of the Case	2
V. Reasons for Granting the Writ	4
VI. Conclusion	12
Appendix	
A. Opinion of Circuit Court of Appeals	13
B. Opinion of Circuit Court of Appeals on Re-hearing	23

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

NO.

CENTRAL LOUISIANA ELECTRIC COMPANY, INC., ET AL.,

Petitioner,

versus

MRS. SARAH LOU P. MOSES, ETC., ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the United States:

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit, entered in the above entitled case on October 30, 1963, wherein a re-hearing was denied on December 16, 1963.

I

CITATIONS TO OPINIONS BELOW

The District Court entered judgment on a jury verdict favorable to the defendant-petitioner without written opinion. The opinion of the Circuit Court of Appeals is printed in Appendix A hereto, *infra* p. 13 and is reported

in 324 F. 2d 69 (1963). Rehearing in the Circuit Court of Appeals was denied without a written opinion. Appendix B, *infra* p. 23.

II

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on October 30, 1963. Rehearing was denied on December 16, 1963. Jurisdiction was vested in the United States District Court by virtue of diversity of citizenship under 28 U.S.C. Section 1332(a)(1). The jurisdiction of this Honorable Court is invoked under 28 U.S.C. Section 1254(1).

III

QUESTIONS PRESENTED FOR REVIEW

(A) Whether the Court of Appeals erred in holding the case of *Dixie Drive It Yourself System v. American Beverage Co.*, 137 So. 2d 298 (1962) as controlling over the facts of the instant case.

(B) Whether the Court of Appeals decision in this case is in violation of Article 5 and the 7th Amendment of the Constitution of the United States.

(C) Whether the Court of Appeals erred in remanding the claim of the Newtons after the jury had expressly found Mr. Newton negligent.

IV

STATEMENT OF THE CASE

The plaintiffs below and respondents in this Court, to-wit, Mrs. Genevieve Newton, individually and as tutrix of her minor children, John Edward Newton and Judith

Ann Newton, and Mrs. Sarah Moses, individually and as tutrix of her minor daughter, Karen Kay, filed suit in the United States District Court for the Eastern District of Louisiana, New Orleans Division, for damages as the result of the death of their husbands, Robert D. Newton and Robert Larry Moses, which resulted when a plane piloted by Mr. Newton in which Mr. Moses was a passenger allegedly collided with certain electric transmission lines owned by Central Louisiana Electric Company, Inc. near the town of Ramos, Louisiana, on November 8, 1957, sometime between the hours of 5:15 and 5:45 P.M.

Suit was instituted against Central Louisiana Electric Company, Inc. (CLECO) and its insurer, Michigan Mutual Liability Company, alleging negligence on the ground that the transmission lines were improperly marked and/or lighted and that this failure constituted negligence which was a proximate cause of the accident. Jurisdiction in the District Court was based on diverse citizenship. By amended complaint, other defendants were named, but the case was submitted to the jury only as against defendants, CLECO and its insurer, Michigan Mutual Liability Company, and R. S. Woodruff and his insurer, State Automobile and Casualty Underwriters.

Defendants, CLECO and Michigan Mutual Liability Company, answered the suit and denied any negligence on their part and further alleged that the accident was caused solely and entirely through the negligence of Robert D. Newton, the pilot. Alternatively, these defendants alleged as a defense the contributory negligence of Robert D. Newton as a bar to the recovery by his widow and his heirs.

Trial was had before a jury beginning November 7, 1961 and resulting in a verdict on November 13, 1961 by

the jury in favor of all of the defendants.

Plaintiffs-respondents motion to set aside part of the jury verdict and for a new trial limited to the question of quantum only or in the alternative that a new trial be granted on all issues was denied by the trial court and thereafter plaintiffs appealed to the Court of Appeals for the Fifth Circuit.

The Court of Appeals for the Fifth Circuit rendered a decision affirming the judgment of the court below as to defendant Woodruff but reversed and remanded the judgment as to CLECO and its insurer. Rehearing was denied without written reasons on December 16, 1963.

V

REASONS FOR GRANTING THE WRIT

(A) In its original opinion rendered in this matter, the Court of Appeals for the Fifth Circuit cited as controlling the case of *Dixie Drive It Yourself System v. American Beverage Co.*, 137 So. 2d 298 (1962), decided by the Supreme Court of Louisiana.

Petitioners herein respectfully contend that the *Dixie* case is not applicable to the instant case for the very obvious reason that in the *Dixie* case the Supreme Court of Louisiana was concerned with a situation where the party injured **had no previous knowledge or means of acquiring such knowledge of** the existence of the hazard that had been created by the violation of a statute or ordinance. The Supreme Court of Louisiana acknowledged this distinction at page 307 of its opinion wherein it states:

> **"As applied to cases of the type here presented,** it rendered nugatory the statutory provisions

against the obstruction of highways." (emphasis added).

It must be noted that in *Dixie*, the Supreme Court was concerned with a hazard created when a truck stopped on a highway and created an obstruction that the plaintiff did not observe until it was too late to avoid the accident. The Court's opinion is based on the fact that the stopped truck had not allowed a sufficient unobstructed portion of the highway and had failed to display signal flags or other warning devices at a specified distance and most importantly, as stated by the Supreme Court at page 304:

> "The display of the red signal flag one hundred feet behind the RC Cola truck **would have served as an advance warning.** * * * **"If either or both** of the approaching drivers had seen the flag or signal, the accident would have been averted." (emphasis added)

Thus, it is submitted, implicit in the holding in *Dixie* is the fact that the hazard must be one **unknown to exist.** Furthermore, a reading of the cases citing the *Dixie* case as controlling will clearly show that, in each such case, the **plaintiff had no pre-existing knowledge of the existence of the hazard.** *Theunissen v. Guidry*, 244 La. 631, 153 So. 2d 869 (1963); *Naquin v. Marquette Cas. Co.*, 244 La. 569, 153 So. 2d 395 (1963); *Perkins v. Texas and N.O. R.R. Co.*, 243 La. 829, 147 So. 2d 646 (1962); *Landrum v. United States Fidelity and Guaranty Co.*, 151 So. 2d 701 (La. App. 1963); *Audubon Ins. Co. v. National Surety Corp.*, 150 So. 2d 612 (La. App. 1963); *Bertrand v. Truck Line Gas Co.*, 149 So. 2d 152 (La. App. 1963); *Vosbein v. Arras*, 149 So. 2d 727 (La. App. 1963); *Larned v. Wallace*, 146 So. 2d 434 (La. App. 1962); *Moses v. Mosley*, 146 So. 2d 262 (La. App. 1962); *Norton v. Argonaut Ins. Co.*, 144 So. 2d 249 (La. App.

1962); *Levert v. Travelers Ind. Co.*, 140 So. 2d 811 (La. App. 1962); *Steagull v. Houston Fire and Cas. Co.*, 138 So. 2d 433 (La. App. 1962); *Foreman v. American Auto. Ins. Co.*, 137 So. 2d 734 (La. App. 1962).

This is not true in the instant case. The record here is replete with testimony that both Mr. Newton and Mr. Moses were entirely familiar with the existence of the transmission lines and had flown in and out of the area where the lines were located over a seven month period prior to the accident. (R. 167, 171, 173, 174, 177, 184, 187, 212, 217-220, 234, 264, 283-285, 308, 331, 337, 339, 438-440, 491 and 502).

It is respectfully submitted that *Dixie* is not applicable to the instant case and that the charge as given by the District Court correctly states the law pertinent to cases of this nature. *Texas & Pac. R.R. Co. v. Jones*, 298 F. 2d 188 (5th Cir. 1962); *Nishida v. E. I. DuPont De Nemours and Co.*, 245 F. 2d 768 (5th Cir. 1957); *Harvey v. Great American Ind. Co.*, 110 So. 2d 595 (1958); *Ardoin v. Williams*, 108 So. 2d 817 (1959); *Gov't Employees Ins. Co. v. Davis*, 266 F. 2d 760 (5th Cir. 1959).

Furthermore, the decision of *Dixie Drive It Yourself System v. American Beverage Co., supra* was decided subsequent to the District Court's decision in the instant case. Therefore, the District Court applied the correct law at the trial of the matter. The Court of Appeals reversed the trial court on the basis of a change in the law occurring in the interim. This practice has been approved of in the past. See generally *Huddleston v. Dwyer*, 322 U.S. 232 (1944) and the annotation in 28 U.S.C.A. 1652 n. 15. However, the recent case of *England v. Louisiana Board of Medical Examiners*, ___ U.S. ___ (1964), has cast strong doubt on this practice. From the decision in

this case it no longer appears that the law on the day of decision is the law of the case. It is submitted, therefore, that the *Dixie* case should not be controlling in the instant case.

(B) The Court of Appeals determination that this case should be remanded for a new trial violates Article 5 and the 7th Amendment of the United States Constitution in that it has rejected a jury's determination of negligence and resulting liability that was based on a thorough understanding of both the factual and legal issues involved. The Court of Appeals based its opinion on its conclusion that the lower court's charge on proximate cause was erroneous. We argue herein that the original requested charge on active-passive negligence, under the facts of this particular case, was not in error. Nevertheless, assuming *arguendo* that the active-passive portion of the lower court's charge was in error, this error was subsequently corrected by the lower court's additional charge on proximate cause elicited by the jury's request for additional instructions. This subsequent charge has received wide acceptance in the courts and is not erroneous. It is considered by some observers as the most widely quoted definition on proximate causation. See 38 Am. Jur., Section 50, p. 695; *Tambiurello v. Travelers Ind. Co.*, 206 F 2d 920 (E.D. La. 1962); *Ardoin v. Williams*, 108 So. 2d 817 (La. App. 1959). This charge does not place undue emphasis on the chronology of the negligent acts and omissions. Moreover, this charge was not objected to by the plaintiff who apparently conceded that this charge corrected the source of his original objection and constituted a correct statement of law to the jury.

It has often been stated that in considering a charge complained of the charge must be considered as a whole and not taken out of context. *Bush v. Louisiana & N.R.*

Co., 260 F. 2d 854 (5th Cir. 1959); *International Paper Co. v. Busby*, 182 F. 2d 790 (5th Cir. 1950). Viewing the lower court's charge as a whole it is obvious that the lower court's remarks on active-passive negligence were relegated to an irrelevant position by the court's later remarks furnished at the jury's request. Analyzing the charge as a whole, the context of the subsequence charge, not objected to, can be viewed in its true light. The jury had received a definition of an admittedly difficult legal concept. They had difficulty in applying this definition to the factual issues before them and therefore requested further clarification from the court. Upon receiving this clarification they resumed their deliberation and returned a verdict. In reaching a verdict they accomplished a task they had been unable to perform without the use of the new definition. Obviously then, the court's additional charge was foremost in their mind and any error that may have been created earlier had been corrected by the court's later, unobjected to, remarks. To say that the jury was still confused as to the issue of proximate cause is to refute the Court of Appeals own words in *Bush v. Louisville & N. R. Co.*, *supra*, wherein it was stated, "We certainly see no basis for concluding that the court could not accept at face value the assurance from the several inquiring jurors that the court's further charge made it clear, and that they did 'understand that now'." Certainly, the predominance of the subsequent remarks in the context of the charge as a whole clearly obliterated any error so as to render it reasonably certain that no prejudice resulted. *Cf.*, *Paramount Film Distributing Corp. v. Applebaum*, 217 F. 2d 101 (5th Cir. 1954).

The jury in the instant case had a thorough understanding of the issues before it. The trial court clearly expressed the position of all the parties concerned in simple terms. Stating the plaintiffs' position it said:

> "If the proper information had been given to the CAA * * * then the CAA would have been in a position to advise as to what markings should have been placed on these structures. And that if this advice had been taken, then this accident would not have happened." (R. 720)

The defendant, CLECO's position was stated thusly:

> " * * * these structures were constructed and marked according to what the reasonable, prudent man would do under the circumstances. And that they did not constitute an undue hazard, and that persons acting reasonable in aircraft could land and take off from the Slaton Base or any other base along Bayou Boeuf by using reasonable Care, with safety." (R. 721).

The lower court states further:

> "In the alternative, they (both defendants) say that this accident occurred because of the negligence of Newton, that Newton knew the lines were there, and he brought his plane in contact with those lines because of his failure to use ordinary and reasonable care under the circumstances. And it was this negligence on the part of Mr. Newton that brought this accident." (R. 722-23 parentheses supplied).

This simple language left little room for confusion in the jury's mind as to the issues before it. In *Whiteman v. Pitrie*, 220 F. 2d 914 (5th Cir. 1955) it was unequivocally stated that the court was without power to consider directly whether the "jury erred" in finding that the appellant was negligent. How then does the power exist to say that the jury was confused especially when the jury requests clarification on the particular

point in question and then returns with a verdict based on answers to interrogatories that are logical within themselves and indicate a rational understanding of the issues presented to them. This Honorable Court has recently held that every effort must be made to find a view of the case that will support the jury's verdict. *Atlantic and Gulf Stevedores v. Ellerman Lines*, 369 U.S. 355, 364 (1962):

> "Where there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way. For a search for one possible view of the case which will make the jury's finding inconsistent results in a collision with the Seventh Amendment."

It is readily apparent that the jury based their findings on proximate causation on the correct statement of the law provided, without objection, to their specific request for further instructions. To reverse this jury's verdict is to deprive the applicants herein of their constitutionally guaranteed right to rely on a jury's determination of their respective liability. Such deprivation certainly violates all concepts of due process of law guaranteed by Article 5 of the Constitution of the United States.

(C) Alternatively, this Honorable Court's attention is respectfully called to Point A of this Petition wherein the Court's attention was directed to the abundant testimony contained in this record concerning the negligence of Mr. Newton, the pilot of the aircraft involved in this unfortunate accident. Additionally, the Court's attention is directed to the finding of the jury that Mr. Newton was negligent in the operation of the aircraft involved and that such negligence was a proximate cause of the accident complained of. (R. 751)

The Louisiana jurisprudence is uniform and without exception that contributory negligence, however slight, is a complete bar to recovery. *White v. State Farm Mut. Auto Ins. Co.*, 229 La. 994, 64 So. 2d 245 (1953).

The Fifth Circuit Court of Appeals opinion indicates that a charge on sudden emergency should have been given in the instant case. Applicants herein respectfully submit that such a charge was not appropriate. A court is not required to charge on an issue not pleaded and not supported by substantial evidence. *Liberty Mut. Ins. Co. v. Arnold*, 118 F. 2d 47 (5th Cir. 1951).

In the instant case, there is **no** evidence that Mr. Newton was confronted by a sudden emergency within the contemplation of the law of Louisiana. The Louisiana Courts have uniformly held that in order for a person to avail themselves of such a plea, **the emergency in which he finds himself must not be brought about by his own negligence.** *Dane v. Canal Ins. Co.*, 240 La. 1038, 126 So. 2d 355 (1960) and the cases cited therein. In the instant case, the emergency alleged by the plaintiffs was the direct result of Mr. Newton in flying his airplane in the vicinity of the transmission lines without having taken proper and reasonable precaution for his own safety. Mr. Newton knew of the existence of these lines; he knew that traffic was heavy on the waterway upon which he intended to land; and he utilized a dangerous and unsafe method of attempting his landing.

In these circumstances, it is respectfully submitted in the alternative that the Court of Appeals for the Fifth Circuit erred in reversing the judgment of the lower Court and remanding the claim relating to Mr. Newton for a new trial.

VI

CONCLUSION

For the above reasons, this petition should receive favorable consideration and a Writ of Certiorari be granted.

Respectfully submitted,

W. Ford Reese

ADAMS AND REESE,
W. FORD REESE,
RICHARD C. BALDWIN,
THOMAS J. WYLLIE,
Attorneys for Michigan Mutual Liability Co.,

JACOB LANDRY,
JACK COUSINS,
Attorneys for Central Louisiana Electric Company, Inc.

CERTIFICATE

I hereby certify that copies of the foregoing petition have been served on Alvin R. Christovich, Sr., 1815 American Bank Bldg., New Orleans, Louisiana; John B. Baus, 225 Baronne St., New Orleans, Louisiana; David W. Robinson, 137 St. Ferdinand St., Baton Rouge, Louisiana; H. Alva Brumfield, 800 Royal St., New Orleans, Louisiana, and Herbert O'Neill, Thibodaux, Louisiana by placing copies of the same in the United States mail, postage prepaid.

New Orleans, La., this 28th Day of January, 1964.

W. Ford Reese

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19600

MRS. SARAH LOU P. MOSES, ETC. ET AL,
Appellants,

versus

CENTRAL LOUISIANA ELECTRIC COMPANY, INC., ET AL,
Appellees

Appeal from the United States District Court for the Eastern District of Louisiana.

October 30, 1963.

Before RIVES and CAMERON, Circuit Judges, and BOOTLE, District Judge.

CAMERON, Circuit Judge: About five thirty P.M. November 8, 1957, Louis D. Newton was piloting an amphibious plane carrying as his passenger Robert L. Moses, both being employees of an oil corporation who were returning to their homes after the day's work. Newton was planning to land his plane adjacent to Slaton's Seaplane Base. Both the pilot and passenger were killed when the plane was flown into one of the transmission wires owned and maintained by Central Louisiana Electric Company, Inc. (CLECO), which crossed the Intracoastal Waterway near the town of Ramos, Louisiana.

which wires were suspended between two towers owned and maintained by the Company. The crossing was at a point sixth-tenths of a mile from Slaton Seaplane Base at which the pilot intended to land, and nine-tenths of a mile from another seaplane base situated in the opposite direction from the Slaton Base.

A civil action was brought by the widow and children of each of the decedents against CLECO and its insurer Michigan Mutual Liability Company and against R. S. Woodruff. Several others were joined as defendants,[1] but were eliminated by orders of the trial court. The lower court consolidated the two civil actions for trial, and they were submitted upon special interrogatories to the jury. The jury answered that CLECO was negligent, but that its negligence was not a proximate cause of the accident; that Woodruff was not negligent; that Newton was negligent and that his negligence was a proximate cause of the accident. No interrogatory was submitted as to whether Moses was negligent. Based upon the jury's answers to the interrogatories, the lower court entered judgment in favor of all defendants. Motions for new trial were heard and denied.

All plaintiffs appealed, specifying as error that the trial court erred in failing to set aside the jury's finding that Newton was negligent, and that his negligence was a proximate cause of the accident; in failing to set aside the jury's finding that CLECO's negligence was not the proximate cause on the ground that the finding was contrary to the manifest weight of the evidence and resulted from erroneous, misleading instructions; in failing to set aside the jury's finding that Woodruff was not negli-

[1] The parties will, in most instances, be referred to as they were aligned in the court below.

gent, and in failing to set aside the jury's verdict and grant recovery for the death of Moses and Newton.

The court below heard some two dozen witnesses, and the evidence was conflicting as to some of the crucial questions and was without conflict as to others. We will refer to the evidence the jury was justified in accepting as the basis of its findings. Eye witnesses to the accident testified that the plane approached the point of collision at an altitude of about six hundred feet from the water with its clearance light and rotating beacon on. Others on the highway paralleling the canal and near Slaton Seaplane Base saw the plane approaching in a westerly direction to make a landing on the water and the plane seemed to have dropped to about the height of the towers. One witness on the highway, arrived at a point opposite the collision after having seen the plane stop in mid air accompanied by a flash, observed the plane in the water and one transmission wire broken. A witness, Hare, chief pilot for Slaton Seaplane Service, had made a landing in the waterway upon his return to the Slaton Base about ten minutes ahead of Newton, and the two had been in radio communication. Hare had used the same method of approach which was followed by Newton. Both had dropped to near tree level height, proceeding into the west-northwest wind, and Hare had gone under the CLECO wires, which Newton was manifestly proceeding to do at the time of the collision. That was a customary route of approach to the Slaton Base.

The Slaton Base was established in 1953 and, by 1955, had about fifteen planes per day taking off or landing. In 1956, Dan Slaton, the owner, was issued an air carrier's certificate authorizing him to operate as an air taxi operator and certifying that Slaton Seaplane Base had met the regulations and standards applicable thereto.

CLECO began making surveys for the location of its transmission lines in 1954. Its application to the Civil Aeronautics Administration dated October, 1955, stated that it knew of no landing areas adjacent to the proposed lines. Slaton wrote CLECO March 12, 1956 requesting the installation of extra markings on the wires in order to make them easier to see, stating that they were a hazard to air traffic using his seaplane base.

Construction of the transmission line was begun in the early part of 1956, the towers being completed in January, 1957, at which time the wires were stretched between the two towers standing on the opposite sides of the waterway. The eight strands of wire ranged from eight to twenty feet apart, with a space of about thirty-six feet between the top and bottom wires. The towers were two hundred fourteen feet high and twelve hundred fifty feet apart. No lights were placed upon them, nor were they painted orange and white in alternating stripes as required by the CAA-FAA Manual. The manual also required overhead wires to be protected by objects spherical in shape with a diameter of not less than twenty inches. There was evidence that there were two less than the required number of these balls on the wire which carried them. A close examination of the nine enlarged photographs in evidence, taken from an airplane at the time when visibility was said to approximate that when the accident happened, shows six balls which appear to be on the top wire only. In general, the pictures with the sky as background do not show the presence of any wires beyond the one upon which the balls were suspended.[2]

All of the evidence about requirements as to such

[2] We know judicially that sunset at the point of accident was 5:12 and the evidence shows that the collision took place about twenty minutes later and that the plane was proceeding away from the afterglow.

structures and the practices in that area was the subject of some dispute; but, on the whole, it seems to be accepted by all parties that the installation of the towers and wires did not comply with the requirement of government agencies and the jury found that CLECO was negligent. The defendants sought to escape responsibility for this failure by showing that the pilot Newton made frequent use of the approach route under these wires and was familiar with their location; and by contending that he ought to have circled the landing base to determine whether water traffic was in close proximity to the wires before using that course for his landing.

The court below gave the jury a lengthy and, on the whole, explicit charge, but we think that it committed reversible error in several particulars. The question of whether the negligence of CLECO, in the installation and maintenance of these wires at a point where frequent use was made of the airways by planes landing and taking off, was a proximate cause of the accident loomed large in the minds of court and jury. The confusion of the jury on this issue was manifested by its return to the courtroom for further instruction with respect to it. Through the foreman it propounded two requests: that the Court "re-read charge quoting negligence by more than one party"; and "define 'a proximate cause of the accident.'" The trial court proceeded to respond as best it could, replying to the jury in part as follows:

> "Now, with reference to a proximate cause of the accident you have put your finger on one of the most difficult definitions in the law. This determination is one which peculiarly calls upon genius of the jury system, and human experience, in making a determination as to what is actually the proximate cause or causes. * * *
>
> Now, in the charge I read you a definition of

proximate cause, and it reads as follows: I charge you further that in the eyes of the law negligence is actionable only when it is the proximate cause of the injury received. That is to say, *where the negligence proceeds in an unbroken chain without independent intervening cause up to the point of causing the accident or precipitating the accident.* Now, that is about as good a definition of proximate cause as you can get. * * * " [Emphasis added.]

The trial court had, in its initial charge and after it had completed its regular charge, given two instructions requested by the defendant CLECO:

> "Unless you find that CLECO was guilty *of an act of negligence* which directly and proximately caused or contributed to the accident, your verdict should be one of no negligence for CLECO, or no proximate cause, if you do find negligence. * * *
>
> "Even if you should find that CLECO was negligent, if you also find that *its negligence had become passive or static and that the negligence of another brought about the conditions which caused the accident*, then your verdict should be for CLECO, or that it was not negligence or not the proximate cause." [Emphasis added.]

These requested instructions, we hold under the facts of this case, should not have been given. Together with the response given to the questions propounded by the jury, they serve to distort and draw out of focus the duty which the law placed upon CLECO. The emphasis upon negligence as *an act* and upon the requirement that it "directly" and "proximately" caused or contributed to the accident, coupled with the instruction that CLECO would be absolved of liability if its negligence had become passive or static; and if the negligence of another brought

about the conditions which caused the accident, was calculated to acquit CLECO of its proven and jury-accepted negligence in maintaining the wires at a point where it knew planes customarily passed over and under them without taking precautions adequate to the surrounding circumstances. The charge as a whole seems to leave the definite impression that the passive and static presence of the wires was not to be considered as negligence if Newton chose to approach the landing under and in close proximity to them, as was the custom.

The Supreme Court of Louisiana, in the recent case of *Dixie Drive It Yourself System v. American Beverage Co.*, 1962, 137 So. 2d 298, 307, reviewed a large number of Louisiana cases dealing with passive negligence and restricted the scope of immunity arising from that doctrine. It said in the latter portion of the opinion:

> "It appears futile to attempt a reconciliation of these and other cases dealing with actions by third parties arising from collisions between a moving and stationary vehicle. This is rendered difficult by the ambiguity of the language of proximate cause. As employed by the courts, proximate cause is a legal concept without fixed content. It is used indiscriminately to refer to cause-in-fact; the scope of liability, and other negligence factors. * * *
>
> "The doctrine of passive negligence, as stated in them, places undue emphasis on the *chronology of the negligent acts and omissions. In so doing it insulates the first wrongdoer from liability to innocent victims.* * * *
>
> "The traffic congestion and advancing speed of recent years have added to * * * [the] danger." [Emphasis added.]

Dixie Drive It Yourself has proven to be a "guide-

line" case, being cited more than a dozen times in opinions of the appellate courts of Louisiana. The Court of Appeals[3] cites it as authority for the principle that "the concept of passive negligence is not recognized in Louisiana law to defeat the claim of an innocent tort victim."[4]

The principles discussed in these cases apply with particular force to the obstruction of air lanes known to be subject to frequent use unless all of the requirements of the law and of reasonable care are observed. Those approaching the landing were entitled to have the benefit of all warning objects required by government regulations or the rules of reasonable care. For these reasons, we think that the charge as a whole was obscure and confusing on the important question of proximate cause; and that it was rendered more so by the inclusion of the two quoted instructions given at the request of CLECO, and that the case as to CLECO should be reversed and remanded for a new trial.

We have concluded that the finding of the jury that Woodruff was not negligent is supported by the evidence and the decisions of the Louisiana courts. At most, the evidence showed that Woodruff, the agent of CLECO, was guilty of nonfeasance in the performance of the contract between them, and was not guilty of a breach of duty owed by him to the plaintiff.[5] *First Federal S. & L. Association v. Continental Equity Life Insurance Co.*, Ct. App. La. 1960, 124 So. 2d 802, and *Southwestern Sugar and Molasses Co. v. Industrial Molasses Corp.*, Ct. App. La., 1961, 135 So. 2d 481.

---

[3] *Steagull v. Houston Fire & Casualty Ins. Co.*, 1962, 138 So. 2d 433.

[4] And see also *Bertrand v. Trunk Line Gas Co.*, Ct. App. La. 1963, 149 So. 2d 152, 154; *Vosbein v. Arras*, Ct. App. La., 1963, 149 So. 2d 727.

[5] On May 16, 1963, a judgment was entered in favor of appellees Continental Casualty Company, Liberty Mutual Insurance Company, and R. D. Cooper, d/b/a R. D. Cooper Construction Co., pursuant to agreement of counsel for the respective parties.

We suggest that, on another trial, the district court take particular note of whether any contributory negligence on the part of decedent Moses was shown. We think that proof on this point is meager indeed, and that it is very doubtful from the record before us whether Moses was chargeable with the contributory negligence of Newton if such should be proven. We suggest, also, that, on another trial, the district court take particular note of the evidence to see whether an appropriate charge on the question of sudden emergency should be given.

The judgment of the court below as to defendant Woodruff is affirmed; the judgment as to the defendant CLECO and its insurer is reversed and the cause remanded for a new trial.

AFFIRMED IN PART and REVERSED AND REMANDED IN PART.

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19600

MRS. SARAH LOU P. MOSES, ETC. ET AL.,
Appellants

v.

CENTRAL LOUISIANA ELECTRIC COMPANY, INC., ET AL.,
Appellees

Appeal from the United States District Court for the Eastern District of Louisiana

(December 16, 1963)

ON PETITION FOR REHEARING

Before RIVES and CAMERON, Circuit Judges, and BOOTLE, District Judge

PER CURIAM

Upon considering the petition for rehearing filed by the appellees, it is ordered and decreed that said petition be and it hereby is DENIED.